IN THE DISTRICT COURT OF BROWN COUNTY, NEBRASKA

THE STATE OF NEBRASKA, Plaintiff-Appellee, vs. **THEODORE E. LINCOLN**, Defendant-Appellant.	Case No. CR02-14 **JUDGMENT ON APPEAL**

DATE OF HEARING: December 6, 2002.

DATE OF RENDITION: December 6, 2002.

DATE OF ENTRY: See court clerk's file-stamp date per § 25-1301(3).

APPEARANCES:

For appellant: Rodney J. Palmer with appellant.
For appellee: David M. Streich, Brown County Attorney.

SUBJECT OF JUDGMENT: Appeal from county court (case number CR02-56).

PROCEEDINGS: See journal entry rendered on date of hearing.

OPINION:

1. The appellant appeals from the judgment and sentence of the county court upon a conviction after bench trial for disturbing the peace.

2. Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record. *State v. Patterson*, 7 Neb. App. 816, 585 N.W.2d 125 (1998).

3. Appellate review is limited to those errors specifically assigned in the appeal to the district court and again assigned as error in an appeal to a higher appellate court. *Miller v. Brunswick*, 253 Neb. 141, 571 N.W.2d 245 (1997). Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error. *Id*. Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects

a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *Id.* Although the statement of errors was filed with the county court and included in the transcript instead of filing the statement in this court as contemplated by Unif. Dist. Ct. R. of Prac. 18, the assignments therein are considered.

4. The appellant claims that the conviction is not supported by sufficient evidence. In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. *State v. Jackson*, 264 Neb. 420, 648 N.W.2d 282 (2002). Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *Id.* When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.*

5. When so viewed, the evidence shows that the then 15-year-old victim left a friend's apartment north of the public library at around 11:00 P.M. to walk to his mother's workplace to get a ride home. As he walked past and in front of the library, he heard a noise by the main door. When he turned to look, he saw the appellant stand up holding a bag or backpack and begin to walk toward the victim. The lights were off at the library and the entrance area was dimly lit. The appellant started walking diagonally across the grass, as if to cut off and intercept the victim. Neither spoke to the other. The victim started walking faster. The victim observed that the appellant then responded by increasing his speed also. The victim stated that the appellant appeared to be trying to stay in front of the victim. That frightened the victim, who then ran off to his mother's work place. Between the time that the victim first saw the appellant and when the victim ran, the distance between

the appellant and the victim decreased somewhat. After the victim ran, the appellant got no closer. The appellant got no closer than 30 feet from the victim. The victim had done nothing to provoke the appellant. Although the age of the appellant does not appear in the trial record, the victim's mother stated that people in the community referred to the appellant as "the bike man" because of his frequent mode of transportation and that "other kids" were not involved. From that testimony, the county court could infer that the appellant was an adult.

6. The leading Nebraska cases on disturbing the peace are *State v. Broadstone*, 233 Neb. 595, 447 N.W.2d 30 (1989) and *State v. Coomes*, 170 Neb. 298, 102 N.W.2d 454 (1960). These cases state the following principles. A breach of the peace is a violation of public order and the same as disturbing the peace. It signifies the offense of disturbing the public peace or tranquility enjoyed by the citizens of a community. The term includes all violations of public peace, order, decorum, or acts tending to the disturbance thereof.

7. Viewing the evidence in the light most favorable to the state, a rational fact finder could determine that the appellant, an adult male, intentionally attempted to intercept the youthful victim, that the appellant's silence forced the victim to rely solely on the appellant's actions to interpret the appellant's intentions, and that the surrounding circumstances (nighttime without other persons in the area) would place a reasonable person of the victim's age and intelligence in fear that such intentions were harmful. In particular, the appellant's use of an intercepting course and the appellant's speeding up as the victim walked faster could constitute nonverbal behavior supporting such interpretation.

8. Of course, there are other, benign ways of viewing the evidence. But as an appellate court, it is not the function of this court to reweigh the evidence.

9. The appellant also attacks the trial court's use of jail time as a condition of probation. While the appellant also assigned excessive sentence, the appellant's argument shows that appellant actually relies upon the county court's denial of court-appointed

counsel at arraignment where the state responded to a court inquiry that it was not "asking" for jail.

10. The excessive sentence claim lacks merit. Whether an appellate court is reviewing a sentence for its leniency or its excessiveness, a sentence imposed by a district court that is within the statutorily prescribed limits will not be disturbed on appeal unless there appears to be an abuse of the trial court's discretion. *State v. Hamik*, 262 Neb. 761, 635 N.W.2d 123 (2001). A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *Id*. The sentencing court is not limited in its discretion to any mathematically applied set of factors. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.

11. Disturbing the peace constitutes a Class III misdemeanor, punishable by up to three month's imprisonment or a $500 fine or both. Section 29-2262(2)(b) authorizes jail confinement as a condition of probation for misdemeanors of the lesser of ninety days or the maximum jail term provided by law for the offense. NEB. REV. STAT. § 29-2262(2)(b) (Cum. Supp. 2002). The 30-day-jail-service condition was clearly authorized by statute.

12. The appellant assigns error in imposing jail time where the appellant requested court-appointed counsel which was denied after the county attorney, in response to the court's inquiry "Is the State asking for jail?", answered "No, Your Honor."

13. A criminal defendant has the right to assistance of counsel at trial for a misdemeanor if, as a result of the conviction, imprisonment is actually imposed. *State v. Golden*, 8 Neb. App. 601, 599 N.W.2d 224 (1999) (citing case relying on *Scott v. Illinois*, 440 U.S. 367, 99 S. Ct. 1158, 59 L. Ed. 2d 383 (1979)). Conversely, where no sentence of imprisonment is imposed, a defendant charged with a misdemeanor has no constitutional right to counsel. *Id*. The flaw in the appellant's reasoning is that, in fact, the appellant *did*

have counsel at his trial. The record shows that appellant's appellate counsel in fact served as counsel for appellant at trial. Consequently, the appellant was not deprived of his right to counsel. Entitlement to the assistance of counsel and entitlement to the provision of counsel at public expense are different matters. *Id*.

14. The record shows that the county court responded to appellant's request for appointed counsel by inquiring if the appellant had completed the application form, and when the appellant stated that he had not, the court apparently sought to save time by inquiring if the state was asking for jail. When the state responded that it was not, the court abandoned the indigence inquiry as no counsel is required where no imprisonment is actually imposed. That did not constitute any contract or agreement with the appellant. For misdemeanor offenses, *actual imposition* of imprisonment triggers entitlement to trial counsel. The appellant did enjoy the right to counsel. When the appellant appeared at trial with counsel, the *potential* of imprisonment again became viable.

15. When the appellant did appear at trial with counsel, no attempt was made to reopen the issue of indigence or appointment of counsel. Indeed, the county court never actually considered the issue of indigence. The determination of indigence will be upheld on appeal unless the trial court has abused its discretion. *State v. Richter*, 225 Neb. 837, 408 N.W.2d 717 (1987). The record does not establish that the appellant was indigent, i.e., unable to retain legal counsel without prejudicing his ability to provide economic necessities for himself or his family. *Id*. The appellant's argument lacks merit.

16. Because the assigned errors lack merit and no plain error appears in the record, the judgment should be affirmed.

ORDER: IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The judgment of the county court is AFFIRMED.
2. Costs on appeal are taxed to the appellant.
3. The mandate shall issue as provided by law.

Signed at Ainsworth, Nebraska, on December 6, 2002.
DEEMED ENTERED upon filing by court clerk.

If checked, the Court Clerk shall:

☎ Mail a copy of this order to all counsel of record and to any pro se parties**, and deliver a certified copy to county court**.
Done on _____, 20____ by _____.

☎ Mail postcard/notice required by § 25-1301.01 within 3 days**, stating "Judgment of county court AFFIRMED**".
Done on _____, 20____ by _____.

☎ Enter on the trial docket as follows: Signed "Judgment on Appeal" entered.
Done on _____, 20____ by _____.

Mailed to:

BY THE COURT:

_____

William B. Cassel
District Judge

THE FOLLOWING DOES NOT CONSTITUTE ANY PORTION OF THE ABOVE JUDGMENT OR ORDER AND IS INCLUDED SOLELY FOR THE CONVENIENCE OF THE CLERK OF THE DISTRICT COURT:

1. Assuming that the clerk of the district court places the file stamp and date upon this order (the "entry" defined by § 25-1301) on Friday, December 6, 2002, the last day for filing notice of appeal and depositing docket fee for appeal to the Nebraska Count of Appeals would be **Monday, January 6, 2003**.

2. If further appeal **is** timely perfected, issuance of the mandate of this court would await the mandate of the higher appellate court.

3. If **no** further appeal is timely perfected, within 2 judicial days after expiration of time for appeal, § 25-2733(1) requires the clerk of the district court to issue the mandate and to transmit the mandate to the clerk of the county court together with a copy of the decision.

4. The clerk of the district court should be prepared to transmit the mandate on **Tuesday, January 7, 2003**.

5. In anticipation, at the clerk's earliest convenience, the clerk should prepare a draft mandate for review to assure that it is properly completed as to form. The form is provided in the form book. The space for the district court decision would be filled in as "**AFFIRMED**".

6. The mandate should be prepared in **two** duplicate originals. Both copies would be properly dated as to date of issuance, signed by the clerk, and the district court seal affixed.

7. **One** of the duplicate originals would be filed in the district court file. It would, of course, be file-stamped and docketed.

8. The **other** would be transmitted to county court on the **same day** that it is **issued**. The clerk of the district court would physically hand carry it to the county court clerk for filing in that court. **Attached** to the county court copy should be a **copy of the above judgment or order**. That attached copy does not have to be specially certified. The judge realizes that, pursuant to the court's instructions, the district court clerk will have already transmitted a certified copy of the judgment or order to the county court at the time of entry. But the statute (§ 25-2733(1)) specifically requires that a copy of the decision be attached to the mandate.